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MEMORANDUM

September 13, 2001

TO: Interested Persons

FROM: Nancy Krier, Assistant Attorney General

SUBJECT: Statutory Limits On The Use of Public Funds/Facilities To Assist or Oppose Campaigns, Particularly Campaigns Involving Ballot Measures or Initiatives

I. INTRODUCTION

The primary purpose of this memorandum is to remind readers about the statutory prohibition at RCW 42.17.130 regarding the use of local public funds and public property and facilities to support or oppose candidates or ballot propositions, including initiative and bond and levy campaigns. This memorandum also presents some factual scenarios that should trigger discussions with local attorneys advising such local public entities, and/or with the Washington State Public Disclosure Commission staff. Finally, this memorandum provides a list of resources for local agency employees and officials who may have questions concerning use of public funds and facilities, with respect to ballot measure or initiative campaigns. This memorandum is not designed to provide legal advice or to replace legal advice provided by attorneys advising local agencies and local officials. In particular, this memorandum does not discuss any local rules, ordinances, procedures or advice that may also address use of public facilities or funds in campaigns.

This memorandum's approach is similar to that in a memorandum prepared by Senior Assistant Attorney General James K. Pharris, which analyzed the Executive Ethics Act's comparable provisions for state agencies at RCW 42.52.180.¹ That memorandum by Mr. Pharris is available at the Attorney General's Office Home Page at www.wa.gov/ago.

This memorandum references the statutes the State Public Disclosure Commission has

¹ Since January 1, 1995, RCW 42.17.130 has been superseded as to state agencies and employees. Laws of 1994, ch. 154, § 317 (codified as RCW 42.17.131) provides that "RCW 42.17.130 does not apply to any person who is a state officer or state employee as defined in RCW 42.52.010". It is also important to note RCW 42.17.190(4) prohibits the use of public funds or facilities to support or oppose an initiative to the Legislature, with exceptions parallel to those contained in RCW 42.17.130.

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analyzed for local agencies and officials in its rules, declaratory orders, and "Guidelines for Local Government Agencies, Including School Districts, in Election Campaigns." ("Guidelines").² Those PDC documents are available online at www.pdc.wa.gov (see "Guide to the Law," "Interpretations.")

II. STATUTORY PROHIBITION AGAINST USE OF PUBLIC FACILITIES TO SUPPORT OR OPPOSE BALLOT PROPOSITIONS

For local public entities, the primary statute on this subject is RCW 42.17.130. The statute reads:

No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency: PROVIDED, That the foregoing provisions of this section shall not apply to the following activities:

- (1) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;
- (2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;
- (3) Activities which are part of the normal and regular conduct of the office or agency.

² The PDC recently updated its guidelines specific to school districts. The "Guidelines for School Districts in Election Campaigns" are available online at the PDC's website. It is anticipated that the local agencies' guidelines will be updated in the future to follow the chart format in the school districts' guidelines. Attorney advisers of local agencies are encouraged, however, to also review the school districts' guidelines.

III. CASES, ATTORNEY GENERAL OPINIONS, INTERPRETIVE RULES, AND DECLARATORY ORDERS

There are only two reported cases construing RCW 42.17.130. The law has been amended since those cases were reported, but I cite to them by way of background. *King County Council v. Public Disclosure Commission*, 93 Wn.2d 559, 611 P.2d 1227 (1980), had concluded that a county council could, as a matter of “normal and regular conduct”, pass resolutions endorsing a ballot measure. *City of Seattle v. State*, 100 Wn.2d 232, 668 P.2d 1266 (1983), held that a city ordinance providing partial public funding for candidates in city elections did not violate RCW 42.17.130. However, subsequent legislation has rendered both of these opinions moot. Later amendments to RCW 42.17.130 explicitly permitted the conduct which the court allowed in *King County Council v. Public Disclosure Commission*, while the enactment of Initiative 134 (RCW 42.17.128) specifically prohibited local governments from using public funds to finance political campaigns for state or local office.

There are three formal attorney general opinions construing RCW 42.17 generally, including RCW 42.17.130. Persons interpreting the current act should read them, but they should also check their analysis carefully against subsequent changes in the statutes interpreted.

The first of the three opinions is AGO 1973 No. 14, a long opinion answering some 23 questions about Initiative 276 (the initiative measure whose approval constituted the enactment of what is now RCW 42.17). This opinion is valuable primarily as a discussion of the historical background of the law. AGO 1975 No. 23 construes the language concerning “normal and regular conduct of the office or agency” and is worth reading since the same language appears in RCW 42.17.130. Finally, AGO 1979 No. 3, construing RCW 42.17.130, concluded that the use of college or university facilities for political conventions, meetings, and candidates' forums did not violate the section, and prohibitions such as RCW 42.17.130 were not intended to cover “neutral public forum” uses of public property, such as the use of publicly owned facilities on a nondiscriminatory basis for political activities.

The PDC has adopted two rules interpreting RCW 42.17.130 in the Washington Administrative Code: WAC 390-05-271 (general applications of RCW 42.17.130) and WAC 390-05-273 (definition of normal and regular conduct). Those rules are discussed in the PDC Guidelines and are available on the PDC's website. They read as follows:

WAC 390-05-271 -

- (1) RCW 42.17.130 does not restrict the right of any individual to express his or her own personal views concerning, supporting, or opposing any candidate or ballot proposition, if such expression does not involve a use of the facilities of a public office or agency.
- (2) RCW 42.17.130 does not prevent a public office or agency from (a) making facilities available on a nondiscriminatory, equal access basis for political uses or

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(b) making an objective and fair presentation of facts relevant to a ballot proposition, if such action is part of the normal and regular conduct of the office or agency.

WAC 390-05-273 -

Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17.130, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

The PDC has issued a number of declaratory orders interpreting RCW 42.17.130. Those orders are orders numbered 1, 2, 4, 10, 13, and 14. They are summarized at the end of this memorandum, and are available on the PDC's website.

Finally, as noted herein, the PDC has provided guidelines to offer further practical assistance in interpreting its rules and statutes. The "Guidelines for Local Government Agencies, Including School Districts, in Election Campaigns" (which is the relevant document for most local agencies) and the more recent and updated "Guidelines for School Districts in Election Campaigns" (which is the relevant document for school districts at this time) are available on the PDC's website.

IV. ADDITIONAL COMMENTS ABOUT THE USE OF PUBLIC FACILITIES

This section of the memorandum is intended to draw together informal advice to state agencies from a variety of sources (primarily generated in response to ballot measures in previous years), and to point to sources available for help in answering questions which may arise. As noted, this memorandum represents only the writer's analysis based upon that information provided at the state level to agencies governed by similar statutes, and is not the official position of the office.

Given the language of the statute itself at RCW 42.17.130, and factoring in cases and opinions interpreting the statute, it is possible to make some general statements about political activities. I think the following activities are **clearly prohibited** by RCW 42.17.130:

1. Using work hours to solicit signatures for ballot propositions, to raise funds for or against such propositions, or to organize campaigns for or against such propositions.
2. Using public property to campaign for or against a ballot proposition, except

that “neutral forum” public property available on a nondiscriminatory, equal access basis and otherwise open to public use may be used for campaigning also.

3. Using public facilities—office space, electronic mail and data processing equipment, word processing and copying facilities, paper, supplies, and any other publicly owned property—for campaigns for or against a ballot proposition, whether during or after work hours.
4. Displaying political material in or on publicly owned vehicles.
5. Displaying or distributing campaign material on publicly owned or operated premises (other than “neutral open forum” property or “personal space” property as discussed in hypothetical question number 5 in Part V below).
6. Using public supplies, equipment, or facilities to print, mail, or otherwise produce or distribute materials supporting or opposing any candidate or ballot proposition.
7. Using publicly owned facilities to instruct or urge public employees to campaign for or against a candidate or ballot proposition on their own time, or stating or implying that their job performance might be judged according to their willingness to use their own time on a campaign.
8. Using public time and/or facilities to draft or pass a resolution by an appointed committee, board, or commission taking an official position for or against a pending ballot proposition.

Turning to the other side, the following **appear to be conduct that is not prohibited** by RCW 42.17.130:

1. An elected legislative body may collectively endorse or oppose a ballot measure if it meets the procedural requirements of RCW 42.17.130.
2. An elected official may make a statement in support of, or in opposition to, a ballot proposition at an open press conference or in response to a specific inquiry or may make incidental remarks concerning a ballot proposition in an official communication, so long as there is no actual, measurable expenditure of public funds. Again, note that this exception is limited to elected officials and does not, by its terms, extend to such “support” activity as using staff time or public facilities to prepare or distribute such a statement, at least if any “measurable expenditure” of public funds is involved.
3. Unless it is inconsistent with some other applicable law or regulation, a public employee is not prohibited from campaigning for or against a ballot proposition

on the employee's personal time. It should be clear that the activity is the individual's personal choice and is not tied to job performance in any way.³

4. Public employees may contact fellow employees, away from the office, to circulate petitions or to solicit one another for funds, volunteers, and other activity for and against a ballot proposition, but only under circumstances which strictly avoid the use of office time and public property. Officers and employees would be wise to avoid soliciting subordinate employees because, under those circumstances, the subordinate employees may feel (no matter how carefully the campaign is conducted or the inquiry is phrased) that the superior is using improper influence.

5. Where public space is available on a nonrestricted basis to post signs, petitions, and advertisements, or to make speeches and hold meetings, public employees may use these "neutral public forum" spaces to express their own views, including their views on pending ballot propositions, assuming they are not otherwise violating RCW 42.17.130. However, it might well be a violation of the statute for public employees to use their positions to gain special advantage in the use of such "public forum" spaces, such as by signing up all the time for the use of a public auditorium before non-employees have had an equal opportunity to seek use of the same space, or by using their access to a public bulletin board to occupy the entire space with favored campaign material and leaving no space available for opposing material (or material relating to other matters).

6. Public agencies may conduct research into the likely results of the passage of a ballot proposition. Indeed, where the passage of the proposition would directly affect the agency's duties, an agency might be remiss for not conducting such research activity. However, it must be clear that the research is being conducted with the purpose of gathering the facts, is directly related to the ordinary conduct of the agency's business (is "normal and regular" for the agency), and is not designed to support or oppose a candidate or ballot measure. I recommend that agencies avoid conducting research or assembling statistical data which they expect to be requested for use in connection with a campaign, unless they are satisfied that they would have undertaken the same research or statistical efforts for independent reasons, such as planning for contingencies.

7. Public agencies and public employees may supply public records in response to requests made by the supporters or opponents of candidates or ballot propositions. An agency should treat all campaigns fairly and equitably in responding to requests for public records.

³ It is an obvious corollary that employees campaigning on their own personal time should avoid stating or implying that they are campaigning on behalf of the public agency.

8. Where two or more measures relate to the same subject, agencies may publish factual information showing the comparative effects of the measures, just as they could publish factual information showing the expected effect of a single measure. However, the agency may not use public facilities or property to favor one proposition over the other, any more than it could urge passage or defeat of both measures.

V. SOME HYPOTHETICAL QUESTIONS, AND SOME SUGGESTIONS ABOUT THE ANSWERS

Following are some hypothetical questions that might be asked about the statute and some comments in response. These situations are offered as a "flag" to the types of fact patterns that should trigger further review and consideration of the statutes and regulations discussed in this memorandum. Readers are cautioned to review current PDC regulations and guidelines in considering possible scenarios that may implicate the statute. Readers who are local officials or agency staff are also strongly encouraged to contact their agency's attorneys, local ethics boards (if the community has such a board) and PDC staff, **before engaging in the conduct**, if they have any questions about whether a particular course of action could result in a complaint to the PDC and/or a PDC enforcement action against the local entity or employees.

1. I serve by appointment on a commission that governs a local agency. I serve part-time and receive no compensation except for attending commission meetings. The other day, I attended a fund-raiser in support of an initiative measure that would, if approved, put the commission on a much more solid financial footing. I attended at my own expense and made a contribution to the campaign, which was properly reported. During the announcements, the announcer, specifically against my request, introduced me to the crowd as "Vice Chair of the X Commission". I quickly pointed out that I was attending as a private citizen. Was the use of my title a use of a "public facility or property"?

Unlike paper or ink or time, an officer's title cannot be measured or "expended" in any meaningful way. Knowledge that a particular candidate or ballot proposition is supported by "Commissioner X" may lend some weight or dignity to a campaign event or advertisement, or it may not. Thus, while it may be prudent to avoid using a position or title, primarily to avoid any implication that the agency or its officers are "officially" supporting a particular candidate or proposition, the mere identification of a person by stating his/her title or position would not seem to be a "use" of public facilities. However, it was wise for you to point out that you were attending in your private capacity in order to prevent any misunderstanding on that point. In the future, consult with your agency's attorneys or local ethics board to determine if there any local ethics rules that otherwise limit use of your title.

2. The head of my agency, Q, is an elected executive officer who supports a ballot measure on his own time. A close friend wants to support the initiative both with financial contributions and volunteering time to the campaign. I do not know the address or telephone number of the campaign office. Would it be all right to send an office voice-mail or e-mail to Q, passing along my friend's name and suggesting that Q forward this information to the campaign?

Remember that voice-mail and e-mail are both office property and facilities. While forwarding the information to Q seems a small thing, it involves both you and Q (Q involuntarily) in the use of office facilities for campaign activity. On your own time, take the steps to find out how to put your friend directly in touch with the campaign without using office facilities. If you don't want to be involved even that much, suggest that your friend contact the campaign directly. A third possibility would be to pass the information along using your own paper and stamp and Q's home address.

3. Everyone in my work unit is a strong opponent of Ballot Measure B. We have all been involved in the anti-B campaign, and we have been careful not to use either our public agency time or any agency facilities, such as paper, computers, or copy machines, in our campaign work. We need to have a campaign meeting next weekend, and the organizers are having trouble finding a place for the meeting. Our agency has a large conference room which is not ordinarily open to the public but which will not be in use during the weekend. Can we offer the use of the room for the campaign meeting?

Although office space is not "consumed" when used for a meeting (small amounts of heat and light notwithstanding), the use of a space not ordinarily available to the public leaves the definite impression that the campaign is benefiting from its use of a public space. The fact that your work unit is all involved in the campaign reinforces this unfortunate impression. In my opinion, using this particular space would violate RCW 42.17.130. If the conference room is generally open to the public, however, and is scheduled for the campaign on the same basis as anyone else could schedule it, the answer might be different. It still might be prudent to have the meeting somewhere else, just to avoid any question about misuse of public facilities.

4. I am the office manager for a local agency and I supervise about 50 employees. My close friend D is a drafter of an initiative. May I invite all my office to a Saturday morning event at my home where they can meet D and will have the opportunity to contribute to the campaign?

Extreme caution is advised. For the obvious points first, avoid the use of office space, office paper, e-mail, voicemail, or any other office facility for the

invitations. Employee mailing lists are also public facilities that may not be used for campaign purposes.⁴ Perhaps you know the phone numbers and addresses by heart, or can use publicly available sources such as telephone and e-mail directories to get the necessary information. Even then, remember that you supervise all of these employees. Will one or more misunderstand why they are invited to a campaign fundraiser at your home? Will they conclude, no matter how you protest otherwise, that they stand to gain your favor if they support the initiative, or to lose your favor if they don't? Even if this is not strictly a violation of RCW 42.17.130, do you want to raise these issues and risk a complaint filed with the PDC?

5. My co-worker and I have strongly different political philosophies. During the last initiative campaign, she wore a large button promoting a position I find repugnant, and she placed a flier about the initiative in her workstation next to the pictures of her husband and her cat. Would it be appropriate for me to ask our supervisor to ban such overt displays this year?

Ethical and policy considerations must always be balanced against free speech rights and the legitimate interest of any employee in expressing her views and in arranging her personal space. The courts and the ethics agencies have recognized that campaign buttons on clothing are a personal expression and do not violate the ethics statute. The use of personal assigned space in a workstation probably meets the same requirement.⁵ The answer would likely be different if a) an employee's space or cubicle or work area is accessible or visible to members of the public, or b) an employee is using publicly visible space, such as a wall, window, or reception desk, which could leave the impression that the campaign is favored by the agency or its leadership.

6. Initiative J would, if approved by the people, repeal the tax that supports 90% of my agency's activities. The Legislature might replace some of the money if the tax was repealed, but it is virtually certain that our agency's budget would be severely reduced. Can we use staff time and agency resources to assemble and publish a sheet that would just "show the facts"– that is, that enactment of

⁴ As a reminder, if there is a public records request for lists of names, your agency should review the public disclosure act's requirements in RCW 42.17, including RCW 42.17.260(9) and RCW 42.17.310(1)(u). If a list is generally available as a public record, it cannot be denied to a person or group on the grounds that it might be used in a campaign. If the record is not generally available to the public, it may not be made "specially" available to or for a campaign.

⁵ However, an employee's office or workspace may not be used under any circumstance as a distribution point for campaign literature or materials, such as posters, bumper stickers, fliers, buttons, or other campaign materials. Likewise, an employee cannot distribute these materials in a public office, such as in hallways, office-to-office, or cubicle-to-cubicle.

Initiative J would effectively end all of the popular programs my agency is involved with?

As noted earlier, as part of their "normal and regular conduct," agencies can anticipate ballot measures by preparing contingency plans or by researching the possible effects of a measure for planning purposes. Your proposal goes considerably beyond that, though. The major flaw in your logic is to characterize as a "fact" your predicted outcome of the legislative session should the Initiative be approved. The Legislature would be free to replace the agency's funding; therefore, it is simply not a "fact" that the agency's programs would be eliminated. It is only speculation. There seems little purpose for the agency to indulge in such speculation, except to influence the election results. Perhaps the agency could publish a true "fact sheet" which, for instance, lists the current programs administered by the agency with its current budget. Perhaps the material also could point out the current source of the agency's budget without speculating what would happen if that funding source disappeared.

VI. SUMMARY

In closing, it is important to remember that the public is generally very sensitive to the use of public facilities or property on ballot propositions or initiatives and takes accusations of violations very seriously. Officers and employees who try to bump up against the "line" that divides lawful from unlawful conduct in this area may find, even if their conduct is eventually judged lawful, that their questionable activity has incited a public backlash against the very position they were attempting to advocate. As a result, public employees should walk a careful line to assure that the public is fully and adequately informed about the consequences of voting on a particular measure, without making unlawful use of public money or property to influence the result of the vote. Local agency staff and officers should consult closely with their legal counsel and local ethics boards on all activities relating to matters before the voters, and they should use utmost skill and care in expressing any comments on such matters. When in doubt, local agency staff and officers are encouraged to contact the PDC.

VII. OTHER RESOURCES

- **Public Disclosure Commission Staff:** (360) 753-1111; toll-free 1-877-601-2828; FAX: (360) 753-1112; e-mail: pdcc@pdcc.wa.gov.
- **Public Disclosure Commission Written Information (PDC website is www.pdc.wa.gov -- See "Guide to the Law"):**

PDC regulations at WAC 390-05-271 (general applications of RCW 42.17.130) and 390-05-273 (definition of normal and regular conduct).

PDC guidelines, including "Guidelines for Local Government Agencies, Including School Districts, In Election Campaigns" and "Guidelines for School Districts in Election Campaigns" (the latter is an updated specific publication for school districts; school personnel should also review RCW 28A.320.090, which addresses distribution of literature).

PDC declaratory orders interpreting RCW 42.17.130 -

- No. 1(RCW 42.17.130 would be violated by a legislator using public facilities or funds to prepare and distribute a newsletter expressing views in opposition to two ballot measures, or to make speeches or distribute legislative materials for the purposes of opposing such measures).

- No. 2 (the production and mailing of a budget questionnaire at county expense during an election campaign would violate RCW 42.17.130 if it includes a cover page which is unrelated to the questionnaire and which draws special attention to a council member who is a candidate).

- No. 4 (the use of a local agency's internal mailing systems for candidate endorsements would violate RCW 42.17.130).

- No. 10 (unless express authority is granted by an independent source, a local agency cannot promote a ballot proposition as "normal and regular conduct" of the agency, for to do so would be in violation of RCW 42.17.130).

- No. 13 (a city is not prohibited by RCW 42.17.130 from organizing and broadcasting a candidate forum where the purpose of the forum is to educate voters about the candidate for office, each candidate is provided an equal opportunity to participate, and the forum is presented in a fashion that is unbiased and nondiscriminatory with regard to all candidates).

- No. 14 (an analysis of when and to what extent RCW 42.17.130 and RCW 42.17.190 affect a school district's ability to engage in activities relating to the support of or opposition to initiatives to the legislature).